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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENT M. DEBOER, Plaintiff - Appellant, v. CITY OF OLYMPIA, a political subdivision of the State of Washington; et al., Defendants - Appellees.	No. 04-35761 D.C. No. CV-03-05358-RJB MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted May 4, 2006
Seattle, Washington

Before: REINHARDT, McKEOWN, and CLIFTON, Circuit Judges.

Plaintiff-Appellant Kent DeBoer appeals the district court's order granting Defendants-Appellees' motion for summary judgment. We affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The district court properly granted summary judgment as to DeBoer's claim that police officers used excessive force in taking him into custody, in violation of 42 U.S.C. § 1983. The police did not act unreasonably in formulating a plan to seize DeBoer. *See Billington v. Smith*, 292 F.3d 1177, 1184 (9th Cir. 2002). In being dispatched to the house, the officers were told that DeBoer had threatened to harm his parents and himself. When they arrived at the DeBoer home, DeBoer appeared to be assaulting his father. As police investigated, DeBoer threw chairs and a pot of scalding water at the officers and threatened them with knives. Even after his parents were out of the house, the number of officers at the scene was limited and the officers could properly consider the possibility that DeBoer would leave the house and put others at risk. Although it might have been prudent to consult the mental health professionals present at the scene before forcibly entering the house, we cannot conclude that the responsible officers violated DeBoer's constitutional rights in failing to do so, given the unsettled and threatening situation that confronted them. *Id.* at 1188-89 (explaining that officers "need not avail themselves of the least intrusive means of responding" and need only act "within that range of conduct we identify as reasonable"). Unlike the situation in *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1361 (9th Cir. 1994), the officers' entry into the house without a warrant was not an

independent Fourth Amendment violation. The situation was not precipitated by defendants but by DeBoer. The plan that the officers devised intended not to inflict harm upon DeBoer. They aimed to subdue him by use of the Taser, secure him to a gurney so he would not be a danger to himself or others, and then transport him to the hospital for appropriate care. Unfortunately, events did not unfold as planned. DeBoer was alerted when the officers failed in their initial attempt to break through the garage door, ran back to the kitchen to rearm himself with several knives, threw a knife as the door was finally opened, and threatened to throw more knives. In light of that active threat, at that point even DeBoer's expert does not appear to dispute the officers' use of force. The officers' actions did not violate the Fourth Amendment. *Billington*, 292 F.3d at 1190 ("[T]he fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself.").

Even if DeBoer did establish a Fourth Amendment violation, the officers were entitled to qualified immunity because it was not clearly established that the officers' actions, notably the failure to confer with the mental health professionals, violated DeBoer's constitutional rights. Sergeant Hutchings, who formulated the plan for taking DeBoer into custody, could have reasonably believed that the plan was lawful. *See Saucier v. Katz*, 533 U.S. 194, 202, 205-06 (2001).

The district court properly granted summary judgment as to DeBoer's claim against the City of Olympia under 42 U.S.C. § 1983. DeBoer presented no evidence that the City of Olympia police acted through an official policy or custom to violate his constitutional rights. *Monnell v. Dep't of Social Servs.*, 436 U.S. 658, 690-91 (1978). DeBoer also presented no evidence that Hutchings was an official with final policymaking authority who ordered the police to violate his rights. *Christie v. Iopa*, 276 F.3d 1231, 1235 (9th Cir. 1999).

DeBoer's remaining state law claims also fail. Our determination that the police did not use excessive force in seizing him precludes DeBoer's assault and battery claim. *Boyles v. Kennewick*, 813 P.2d 178, 179 (Wash.App. 1991). The public duty doctrine precludes DeBoer's claims that the individual officers were negligent. *Taylor v. Stevens County*, 759 P.2d 447, 449 (Wash. 1988). DeBoer also has not shown that there are any genuine issues of material fact as to whether the City of Olympia negligently hired, trained, and supervised the police officers.

AFFIRMED.